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No. 92-123

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

EARLUS LEON WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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10 pp

QUESTIONS PRESENTED

1. Whether petitioner was properly classified as a career offender under the Sentencing Guidelines.

2. Whether the district court erred in not departing downward from the Guidelines sentencing range.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A2, is unpublished, but its judgment is noted at 958 F.2d 372 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1992. The petition for a writ of certiorari was filed on June 16, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In the United States District Court for the Northern District of Ohio, petitioner pleaded guilty to possession with intent to distribute cocaine, in violation

of 21 U.S.C. 841(a)(1), and use of a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c). He was sentenced to 228 months' imprisonment. The court of appeals affirmed. Pet. App. A1-A2.

On February 12, 1990, following a high speed chase by police, petitioner lost control of his car and crashed into a stop sign. Upon petitioner's arrest, the police seized a revolver, some ammunition, 97.9 grams of cocaine, and cash from petitioner's car. Petitioner subsequently confessed to possessing the cocaine and the firearm. Gov't C.A. Br. 2.

Petitioner had two prior convictions for aggravated robbery and a conviction for drug possession. Based on those offenses, the probation office concluded that petitioner was a career offender under the Sentencing Guidelines. See Presentence Report 5-6. At the sentencing hearing, the district court requested documentary proof of petitioner's prior aggravated robbery convictions. After a short recess, the probation officer obtained a state journal entry showing that petitioner pleaded guilty to aggravated robbery in 1981. Pet. App. A12-A18. When the court asked petitioner for any objections to the record and the government's contention that he was a career offender under the Guidelines, petitioner replied that "I say, very reluctantly, I have to agree with the Probation Department's assessment that the career offender definition is fulfilled here." *Id.* at A21. After further inquiry, the district court obtained a report that showed that petitioner had been convicted on two separate aggravated robbery charges for which he had received concurrent sentences. *Id.* at A28.

Just before it imposed sentence, the district court held a side-bar conference with petitioner's wife to determine whether she wanted petitioner's children to be present in the courtroom when sentence was

imposed. The court told petitioner's wife that it would have preferred to sentence petitioner to a lesser term, but that under the Guidelines the court "ha[d] no discretion at all in imposing a lesser sentence, that's the way it is." Pet. App. A30. The court then sentenced petitioner as a career offender under the Guidelines.

The court of appeals affirmed. The court held that petitioner was correctly adjudged to be a career offender under the Guidelines. It also held that petitioner's contention that the district court improperly failed to depart downward from the Guidelines sentencing range was not cognizable on appeal. Pet. App. A1-A2.

ARGUMENT

1. Petitioner contends (Pet. 8-9) that his prior convictions for aggravated robbery do not qualify as convictions for a "crime of violence" under the career offender provisions of Sentencing Guidelines §§ 4B1.1 and 4B1.2. Petitioner forfeited that claim, however, because he specifically agreed at trial that he was properly classified as a career offender. Rights are lost if not timely asserted at trial. See *Yakus* v. *United States*, 321 U.S. 414, 444 (1944); accord *Peretz* v. *United States*, 111 S. Ct. 2661, 2669 (1991). That principle also applies when a party agrees at trial that no error has been committed. See *United States* v. *Angiulo*, 897 F.2d 1169, 1216 (1st Cir.), cert. denied, 111 S. Ct. 130 (1990). Indeed, when a defendant or his counsel agrees to or acquiesces in a particular course of action at trial, it is clear that the parties have adverted to the issue and that the failure to object is not due to counsel's negligence or inattention. *Estelle* v. *Williams*, 425 U.S. 501, 510 (1976).

In any event, robbery is clearly a "crime of violence" under the Sentencing Guidelines, because rob-

bery "has as an element the use, attempted use, or threatened use of physical force against the person of another." Sentencing Guidelines § 4B1.2(1)(i). Moreover, Application Note 2 to Sentencing Guidelines § 4B1.2 expressly lists robbery as a "crime of violence." The courts of appeals have uniformly held that robbery is a "crime of violence" under the Sentencing Guidelines, regardless of the facts of the particular crime at issue. See, *e.g.*, *United States* v. *Leeper*, 964 F.2d 751, 753 (8th Cir. 1992); *United States* v. *Mendoza-Cecelia*, 963 F.2d 1467, 1474 (11th Cir. 1992); *United States* v. *Spencer*, 955 F.2d 814, 820 (2d Cir. 1992); *United States* v. *Wilson*, 951 F.2d 586, 588 (4th Cir. 1991), cert. denied, 112 S. Ct. 2294 (1992); *United States* v. *Jones*, 932 F.2d 624, 625 (7th Cir. 1991); *United States* v. *McAllister*, 927 F.2d 136 (3d Cir.), cert. denied, 112 S. Ct. 111 (1991); *United States* v. *McDougherty*, 920 F.2d 569, 573-574 (9th Cir. 1990), cert. denied, 111 S. Ct. 1119 (1991); *United States* v. *McVicar*, 907 F.2d 1, 1-2 (1st Cir. 1990).*

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* Petitioner's reliance (Pet. 8) on *United States* v. *Flores*, 875 F.2d 1110 (5th Cir. 1989), and *United States* v. *Brunson*, 907 F.2d 117 (10th Cir. 1990), cert denied, 111 S. Ct. 1011 (1991), is misplaced. Each case in fact held that the defendant's burglary conviction qualified as a "crime of violence" under the career offender Guidelines.

Petitioner correctly observes (Pet. 8) that *United States* v. *Baskin*, 886 F.2d 383 (D.C. Cir. 1989), cert. denied, 494 U.S. 1089 (1990), permits a sentencing court to look at the facts underlying a defendant's prior robbery conviction to determine whether that conviction qualifies as a "crime of violence" under the Guidelines. 886 F.2d at 389-390. However, the District of Columbia Circuit also requires a defendant to request that the sentencing court consider the facts of his conviction to determine whether it qualifies as a "crime of violence" or whether a downward departure is warranted. *United States* v. *Bradshaw*, 935 F.2d 295, 303 (D.C. Cir. 1991). Because petitioner specifically agreed that his prior aggravated robbery

Moreover, petitioner's prior convictions were for aggravated robbery, not simply for robbery. Ohio law defines aggravated robbery as the theft of property from another by: (1) a deadly weapon or dangerous ordinance, or (2) inflicting or attempting to inflict serious physical harm on another. Ohio Rev. Code Ann. § 2911.01 (Anderson 1987). Ohio defines aggravated robbery as a crime of violence. Ohio Rev. Code Ann. § 2901.01(I) (Anderson 1987). Under either method of committing the offense, the Ohio crime of aggravated robbery obviously is a crime of violence within the meaning of Guidelines § 4B1.2(1). The offense of robbery while armed involves the threatened use of physical force against another, while the offense of robbery by inflicting or attempting to inflict physical force on another involves the use or attempted use of physical force against another. Accordingly, the sentencing court properly held that petitioner's prior aggravated robbery convictions qualified as convictions for a "crime of violence" under the career offender Guidelines.

2. Petitioner also argues (Pet. 10-11) that the district court denied him the right to be considered for a downward departure from the Guidelines by erroneously concluding that it had no authority to depart downward from the Guidelines range. First, petitioner has forfeited that claim because he did not request a downward departure at trial. See *United States* v. *Bradshaw*, 935 F.2d 295, 303 (D.C. Cir. 1991); see generally *Yakus* v. *United States*, *supra*; *Peretz* v. *United States*, *supra*. Second, petitioner's claim is not supported by the record. The district court did not hold that it had no authority to depart downward from the Guidelines sentencing range. Petitioner

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conviction qualified as a "crime of violence," *Baskin* does not assist him.

relies on the court's statement that it had no discretion to impose a lesser sentence on petitioner, but the court made that statement to petitioner's wife during a side-bar conference to determine whether she wanted petitioner's children to be present during the imposition of sentence. In context, the court was simply explaining to a layperson that the court was required to sentence petitioner under the Guidelines, rather than to impose a sentence at the court's discretion. The court's remark was a casual aside, not a ruling of law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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